Public Prosecutor v Lau Siew Nguong & Anor

HIGH COURT (SIBU) — CRIMINAL APPEAL NO 41 OF 1991
MUHAMMAD KAMIL JC
11 OCTOBER 1993

Customs and Excise — *Importing prohibited goods — Permits not produced when goods were claimed — Whether that contravened s 135(1)(a) of the Customs Act 1967 — Customs Act 1967 s 135(1)(a) — Customs (Prohibition of Import) Order 1988 r 3*

Customs and Excise — *Forfeiture — Importing prohibited goods under Customs (Prohibition of Import) Order 1988 — No offence committed under s 127(1) of the Customs Act 1967 — Whether forfeiture rightful — Customs Act 1967 s 127(1)*

The appellants were charged with importing prohibited goods, ie frozen chicken wings ('the goods'), without a valid import licence issued by the Director General of Customs under the Customs (Prohibition of Import) Order 1988 ('the Order'), which was an offence under s 135(1)(a) of the Customs Act 1967 ('the Act'). The prosecution alleged that the appellants had produced incomplete declaration forms when they claimed the goods as the import permits were not attached but were only produced the next day. At the conclusion of the case, the appellants were acquitted and discharged by the magistrates' court. The goods, however, were ordered to be confiscated. Both sides have appealed against this decision ; the prosecution against the acquittal and discharge of the appellants on both charges, and the appellants against the order for forfeiture of the goods.

Held, allowing the appellants' appeal and dismissing the prosecution's appeal:

(1) For the purpose of the importation of chicken wings, the import licence issued by the Veterinary Department is all that is required under the Order. As the only veterinary officer of the Sibu Veterinary Department was away on duty at the material time, there was no one to sign the permits. From the evidence before the court, the appellants did not have the intention to evade the law and the magistrate had not misdirected himself on the facts of the case.

(2) It is clear that forfeiture under s 127(1) of the Act is mandatory if the offence against the Act has been committed and the goods were the subject matter of or were used in the commission of the offence. In the instant case, no offence was committed against the Act because the goods were covered by the import permits issued by the Veterinary Department and the permits had not been withdrawn. Therefore they were imported under valid permits. The duties on the goods had been paid before the issue of the permits and as such, they were not the subject matter of the offence. In the circumstances of the case, the order of acquittal

was confirmed, the order of forfeiture set aside, and the goods or the proceeds thereof ordered to be returned to the appellants.

[Bahasa Malaysia summary

Perayu telah dituduh kerana mengimport barangan larangan, iaitu kepak ayam sejuk beku ('barangan itu'), tanpa lesen import yang sah yang dikeluarkan oleh Ketua Pengarah Kastam di bawah Aturan Kastam (Larangan Import) 1988 ('Aturan itu'), yang merupakan suatu kesalahan di bawah s 135(1)(a) Akta Kastam 1967 ('Akta itu'). Pihak pendakwa mengata bahawa perayu telah mengemukakan borong deklarasi yang tidak sempurna apabila mereka menuntut barangan itu kerana permit import tidak dilampirkan tetapi hanya dikemukakan pada hari keesokannya. Pada penghujung kes, perayu telah dibebaskan dan dilepaskan oleh mahkamah majistret. Tetapi barangan itu telah diperintahkan supaya dirampas. Kedua-dua pihak telah membuat rayuan terhadap keputusan ini; pihak pendakwa terhadap pembebasan dan pelepasan perayu atas kedua-dua tuduhan itu, dan perayu terhadap perintah rampasan barangan itu.

Diputuskan, membenarkan rayuan perayu dan menolak rayuan pihak pendakwa:

(1) Bagi tujuan mengimport kepak ayam, hanyalah lesen import yang dikeluarkan oleh Jabatan Haiwan yang diperlukan di bawah Aturan itu. Oleh kerana pegawai haiwan tunggal di Jabatan Haiwan Sibu telah pergi bertugas di tempat lain pada masa material, tidak ada sesiapa untuk menandatangani permit itu. Daripada keterangan di hadapan mahkamah, perayu tidak berniat untuk mengelakkan diri daripada undang-undang dan majistret tidak salah mengarahkan diri mengenai fakta kes ini.

(2) Jelas bahawa rampasan di bawah s 127(1) Akta itu adalah mandatori jika suatu kesalahan telah dilakukan di bawah Akta itu dan barangan itu merupakan isi perkara atau telah digunakan untuk melakukan kesalahan itu. Di dalam kes ini, tidak terdapat kesalahan yang telah dilakukan terhadap Akta itu kerana barangan itu dilingkungi oleh permit import yang telah dikeluarkan oleh Jabatan Haiwan dan permit itu tidak ditarik balik. Oleh itu, barangan itu telah diimport di bawah permit yang sah. Duti ke atas barangan itu telahpun dibayar sebelum permit itu dikeluarkan dan dengan demikian, tidak merupakan isi perkara kesalahan itu. Memandangkan keadaan kes ini, perintah pembebasan itu disahkan, perintah rampasan itu diketepikan, dan barangan itu atau hasil kutipannya diperintah supaya dikembalikan kepada perayu.]

Notes

For cases on forfeiture of goods where no offence had been committed, see 6 *Mallal's Digest* (4th Ed) paras 64–66.

A **Cases referred to**

1 *Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249 (refd)

2 *PP v Mohd Omar Lopez @ George Anthony Lopez* [1993] 1 CLJ 222 (distd)

B **Legislation referred to**

Customs Act 1967 s 127(1)

Abdul Rahman bin Sebeli (Deputy Public Prosecutor) for the appellant.
Dr Chew Peng Hui (*Battenberg & Talma*) for the respondents.

C *Cur Adv Vult*

Muhammad Kamil JC: The appellants, the proprietor/manager and clerk, respectively, of Sing Lieong Trading Company and Top-Most Sdn Bhd were charged as follows:

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(1) That you, Lau Siew Nguong and Lau Hui Ong being then the proprietor and the clerk, respectively, of Sing Lieong Trading Company, 5 Lane 1, Lanang Road, Sibu, at about 11.40am on 2 October 1989 at Rajang Port Authority Wharf, Sibu, were jointly concerned in the importing of prohibited goods, to wit 14,960kg of frozen chicken wings valued at RM29,920, such E goods being goods the import of which is prohibited except under and by virtue of a valid import licence issued by the Director General of Customs under the Customs (Prohibition of Import) Order 1988 (PU(A)408) and thereby committed an offence under s 135(1)(a) and punishable under s 135(1)(iii) of the Customs Act 1967.

(2) That you, Lau Siew Nguong and Lau Hui Ong, being then the manager and F the clerk, respectively, of Top-Most Sdn Bhd at about 11.40am on 2 October 1989 at Rajang Port Authority Wharf, Sibu were jointly concerned in the importing of prohibited goods, to wit 14,484kg frozen chicken wings valued at RM28,968, such goods being the goods the import of which is prohibited except under and by virtue of a valid import licence issued by the Director General of Customs under the Customs (Prohibition of Import) Order 1988 (PU(A)408) and thereby committed an offence under s 135(1)(a) G and punishable under s 135(1)(iii) of the Customs Act 1967.

At the conclusion of the case, both respondents were acquitted and discharged by the magistrates' court. The frozen chicken wings, however, were ordered to be confiscated.

H Against this decision, both sides appealed; the prosecution against the acquittal and discharge of the respondents on both charges, and the respondents against the order for forfeiture of the chicken wings.

The prosecution story was that on 2 October 1989, the MV Cris Lemona arrived at the Rajang Port Authority Wharf and amongst other things, there were two containers of frozen chicken wings. The respondents came to I claim the chicken wings and produced two declaration forms which were not complete as the import permits ('the AP') were not attached. The AP were produced only on the next day, 3 October 1989. Therefore they had contravened s 135(1)(a) of the Act.

The defence story was that they could not get the AP on 2 October 1989 as the veterinary officer, the only one stationed in Sibu, was away on travelling duty from 2–5 October 1989. It appears that the practice has been that an importer has to produce two types of import documents, viz the permit on Form C (the AP) from the Veterinary Department which is valid for one shipment only, and a 'lesen import di bawah s 11 (Akta Kastam 1967)' [import licence under s 11 (Customs Act 1967) ('the Act')]. The AP is a prerequisite because the particulars of this AP will have to be endorsed under item 21 of the import licence. Without this endorsement, it appears that the import licence is not valid.

The AP could only be issued on the day the chicken wings arrived because it was necessary to know the exact weight of the consignment (ie chicken wings) for the purpose of the fee to be calculated and paid by the importer. All these will be done after the physical inspection of the goods to ascertain the fitness of the goods, eg that the chicken wings are fit for human consumption. It is prescribed in r 3 of the Customs (Prohibition of Imports) Order 1988 (hereinafter 'the Order 1988') which states:

> The importation into the Federation of all goods specified in columns (2) and (3) of the Second Schedule hereto, originating from the countries shown in column (4) of the said Schedule is prohibited, except under and by virtue of an Import Licence granted by the Director General of Customs or the proper officer of customs appointed by the Director General of Customs to act on his behalf at the Ministry, Department or Statutory Body mentioned in column (5) of the said Schedule, and subject to such conditions as may be specified in such licence.

The Second Schedule referred to in r 3 of the Order 1988, states:

(1) Item No	(2) Description of goods	(3) Heading/ Subheading	(4) Country	(5) Ministry/Department/ Department/Statutory body issuing licence
2	Poultry (fowls, chicks, ducks, geese, turkeys, guinea fowls and pigeons) alive or dead or any part thereof	No	All countries	Veterinary Department

For the purpose of the importation of chicken wings, the import licence (AP) issued by the Veterinary Department is all that is required. It is, however, not clear what is the exact procedure to be followed once the AP is obtained. The practice seems to be that the AP and the 'lesen import' have to be submitted together for the import of the chicken wings.

From the evidence, the AP was dated 3 October 1989. The respondents obtained the AP on 3 October 1989 from the Veterinary Department at Kuching. The respondents had been in this business of importing chicken wings for a long time, more than 10 years, and this was the procedure which had been followed for obtaining customs clearance since. PW19 (Dr Humrawali Khan) confirmed that he was attached to the Veterinary

A Department, Sibu at the material time and he was the only veterinary officer. On 2 October 1989 to 5 October 1989, he was on travelling duty, ie he was not in Sibu. In the cross-examination, he stated that if he had been in Sibu on 2 October 1989, there would be no problem; he would have issued the AP. He explained that a person who applies for a AP must
B give the exact weight for the purpose of the fee which was calculated based on weight.

> Q : In your dealing with [the] accused are they bona fide businessmen?
> A : Yes. No hanky-panky.
> Q : If you are not in Sibu, how could someone get the AP?
> A : Wait for me to come back or get it from other veterinary officer in other
C division.

That was exactly what the respondents did. They did not wait for PW19, they went to Kuching and obtained the AP from the Veterinary Department, Kuching. Hence they were one day late.

The learned magistrate believed the story of the defence. He said:

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> The facts of the case also show that the accused had applied [for a] permit/licence on 2 October 1989 in Sibu but as the veterinary officer (PW19) was away from Sibu on travelling [duty] from 2 October 1989 to 5 October 1989, there was no one in Sibu to sign the permit/licence. The accused managed to get the permit/licence issued in Kuching on 3 October 1989.
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> E The issue that I have to decide from the totality of the evidence before me is whether the accused had the guilty mind to evade the provision of the law.
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> From the totality of the evidence before me I am satisfied and of the considered opinion that both the accused persons do not have the guilty mind to evade the provision of the law.

F I do not hesitate to support the magistrate's finding. He had not misdirected himself on the facts of the case and had come to a correct decision.

Now I come to the cross-appeal of the respondents against the order of forfeiture of the chicken wings.

Section 127(1) of the Act provides:

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> An order for the forfeiture or for the release of anything liable to forfeiture under this Act shall be made by the court before which the prosecution with regard thereto has been held, and an order for the forfeiture of goods shall be made if it is proved to the satisfaction of the court that an offence against this Act or any regulation made thereunder has been committed and that the goods were the subject matter of or were used in the commission of the offence notwithstanding that no person may have been convicted of such offence.

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It is mandatory that the court orders forfeiture notwithstanding that there is no conviction. In *Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru*,[1] Abdul Hamid FJ (as he then was) delivering the Federal Court judgment, said at p 251:

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> The fundamental question that calls for determination is whether there is proof to the satisfaction of the court that an offence against the Ordinance (similarly the Act) has been committed and whether the goods are the subject matter of the offence ...

It is clear that forfeiture under s 127(1) of the Act is mandatory if two conditions are to proved to the satisfaction of the court: A

(i) the offence against the Act has been committed; and
(ii) that the goods were the subject matter of or were used in the commission of the offence.

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In the instant case, there is no offence committed against the Act because the chicken wings were covered by the AP issued by the Veterinary Department on 3 October 1989, and that permit had not been withdrawn. Therefore they were imported under a valid permit. The case of *PP v Mohd Omar Lopez @ George Anthony Lopez*[2] is distinguished in that the licence for the importation of one unit of Nissan Safari Jeep and four units of Toyota Hi-Ace Van was revoked by the Customs. The duties on chicken wings had been paid before the issue of the permit and as such, they were not the subject matter of the offence. Section 79 of the Act permits the importer at least two months within which to declare the goods imported and it would certainly give him enough time for the obtaining of the permit from the Veterinary Department. In this case, it was explained that the container had to be returned to the owner almost immediately, therefore the respondents had to take out the chicken wings. C D

In the circumstances of the case, the order of acquittal is confirmed, the order of forfeiture is set aside, and I order that the chicken wings or the proceeds thereof be returned to the owner. E

Order accordingly.

Reported by Anne Khoo

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